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STATE OF ALASKA ET AL.

41 IBLA 315

Decided *July 11, 1979*

Appeals from decisions of the Alaska State Office, Bureau of Land Management, holding Native allotment applications for approval and rejecting State selections.

Decisions set aside and cases remanded.

1. Administrative Procedure: Standing—State Selections

Where the State is a party to decisions by the Bureau of Land Management and the State's selection applications were rejected by those decisions, under 43 CFR 4.410, the State has standing to appeal those decisions to the Board of Land Appeals.

2. Alaska: Alaska Native Claims Settlement Act—Alaska: Land Grants and Selections: Generally—Alaska: Native Allotments—Alaska Native Claims Settlement Act: Aboriginal Claims—Indian Lands: Generally—State Selections

The Alaska Native Claims Settlement Act extinguished aboriginal occupancy claims of Alaska Natives; such claims cannot serve as a bar to a State selection, nor preclude the State from challenging Native allotment applications conflicting with its selection.

3. Administrative Procedure: Standing—Alaska: Alaska Native Claims Settlement Act—Alaska: Land Grants and Selections: Generally—Alaska: Native Allotments—Alaska Native Claims Settlement Act: Aboriginal Claims—Indian Lands: Generally—Rules of Practice: Private Contests—State Selections

Under the "functional" standard to determine administrative standing set forth in *Koniag, Inc.* v. *Andrus*, 580 F. 2d 601 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979), the State of Alaska has standing to challenge Native allotment applications conflicting with its selection applications even if the land is within a Native village selection area under the Alaska Native Claims Settlement Act. The State has standing under Departmental regulations to initiate private contests against such conflicting Native allotment applications.

4. Rules of Practice: Private Contests—Words and Phrases

"*Person.*" A state is a "person" within the meaning of the Department's private contest regulations.

5. Administrative Procedure: Adjudication—Alaska: Land Grants and Selections: Generally—Alaska: Native Allotments

State of Alaska selection applications should not be rejected because of conflicts with Native allotment applications which are to be approved without first affording the State notice of such action to be taken and an opportunity to contest the conflicting claims if it desires.

APPEARANCES: Thomas E. Meachum, Esq., Assistant Attorney General, State of Alaska, Anchorage, Alaska, for appellants; Alaska Legal Services Corp., Anchorage, and Ketchikan, Alaska, for Native allotment applicants.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

The appeals which have been consolidated for this decision all involve State selection applications filed pursuant to the Alaska Statehood Act, P.L. 85–508, 72 Stat. 339 (1958), and Native allotment applications filed pursuant to the Act of May 17, 1906, 34 Stat. 192 *as amended* by the Act of Aug. 2, 1956, 70 Stat. 954, 43 U.S.C. §§ 270–1 to 270–3 (1970) (now repealed subject to pending applications, sec. 18(a), Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617 (1976)).[1] The cases are identified in Appendix A attached hereto. The State selections in the subject cases were all partially rejected because of conflicting Native allotment applications which the Alaska State Office, Bureau of Land Management (BLM), found valid.[2]

Alaska Legal Services Corp. (ALSC), representing some of the Native allotment applicants,[3] filed a motion to dismiss the State's appeals for lack of standing. ALSC asserts that the lands appiled for by the State are subject to valid village selections under sec. 12(a)(1) of ANCSA, and that sec. 11(a)(2) of ANCSA withdraws for village selection, "lands * * * that have been selected by or tentatively approved to, but not yet patented to, the State under the Alaska Statehood Act * * *" ALSC Memorandum In Support of Motion for Dismissal of State's Appeal, p. 1. Therefore, ALSC argues, even if the Native allotment applications are rejected, the village corporations would acquire the land; thus, the State has no direct interest in the land and lacks standing to appeal. ALSC further argues that the State had a duty to ascertain if the lands selected were occupied by Natives and failure to do so does not prevent the State being charged with notice of such occupancy. ALSC asserts that the cases, *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), and *State of Alaska, John Nusunginya*, 28 IBLA 83 (1976), are distinguishable on their facts. It argues that initiation of a Government contest by BLM would unfairly place the burden of proof on the Native allotment applicants who have already been found to satisfy the requirements of the Native Allotment Act.

The State filed a statement of reasons which adopts the reasons for appeal submitted in the *Nusunginya* case, *supra*, and a statement of standing. The State filed these selection applications before any of the Native allotment applications

[1] These 11 cases were consolidated with 7 others by order of July 30, 1976, under the rubric Mary Klein Zimin, 76–639. On further consideration of the matter we have decided that there are differences in the issues in the cases which necessitate the issuance of separate opinions.

[2] The decisions below issued in 1976. Our consideration of these appeals has been delayed pending decisions by the United States Court of Appeals in *Pence* v. *Kleppe*, 529 F.2d 135 (9th Cir. 1976), and *Pence* v. *Andrus*, 586 F.2d 733 (9th Cir. 1978).

[3] Native allotment applicants in the following cases are represented by ALSC: 76–639, 76–640, 76–687, 76–689, 76–692, 76–715, and 76–777. No appearances were entered for the Native allotment applicants in the remaining cases here concerned.

were filed. Many of the State selections had been tentatively approved. Under 43 CFR 4.410, "any party to a case who is adversely affected by a decision of an officer of the Bureau of Land Management * * * shall have a right to appeal to the board." The State argues that the decisions of the Alaska State Office rejecting the State selections because of conflicting Native allotment applications are decisions adversely affecting the State and are appealable. The State asserts that the selection applications segregated the lands from appropriation and precluded subsequent filing by an adverse claimant. This establishes an equitable interest in the lands "which cannot be summarily erased by a discretionary decision to approve a Native allotment application."

In response to ALSC's argument that ANCSA withdrew these lands for village selection, the State has withdrawn it appeals concerning parcels of lands withdrawn for compulsory core township selection by Native villages. The State contends that some of the lands still subject to this appeal are not withdrawn by secs. 11 and 12 of ANCSA, and some of the lands were selected under the Mental Health Enabling Act, 70 Stat. 709, 711, and are not subject to the withdrawals in secs. 11 and 12 of ANCSA. As to those lands which are subject to the withdrawal, the State points out that the villages are not required to select the lands, that they have selected thousands of acres more than they are entitled to receive, and, therefore, it is not certain that the lands will not be available for conveyance to the State. The State thus asserts it has a sufficient interest in the lands to support its appeal.

Substantially, the State argues that its applications segregated the land from any subsequent appropriation. It has urged, as summarized in *Nusunginya*, *supra* at 85:

> * * * Moreover, because the allotment to a Native is within the discretion of the Secretary, the allotment cannot be the kind of "valid existing right" preserved by section 6(a) of the Statehood Act. The State urges that this Board overrule two of its earlier decisions which upheld the right of Natives to make application subsequent to the filing of a state selection application, where use and occupancy preceded the state selection: *Archie Wheeler*, 1 IBLA 139 (1970); *Lucy Ahvakana*, 3 IBLA 341 (1971). Third, the State argues that section 4(c) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1603(c) (Supp. IV, 1974), was a congressional confirmation of all previous tentative approvals which cannot be revoked by administrative decisions. Fourth, the State argues that the fact that a Native qualifies for an allotment does not necessarily remove the land from the category of "vacant, unappropriated, and unreserved." Finally, it should be noted that the State takes umbrage at not being informed of the Native's application until the decision rejecting its selection application. It contends that this omission denies it any opportunity to present an informed and effective protest and present its position.

The State asserts that BLM's rejection of the selections without notice and an opportunity to be heard violates due process and requests that the Government initiate

contest proceedings in which the State is allowed to intervene against the Native allotment applicants, or alternatively that it be allowed to contest the conflicting applications.

[1] Regulation 43 CFR 4.410, quoted above, gives a right of appeal to this Board to any party adversely affected by a BLM decision. The State is a party to the decisions below, and the State's selection applications were rejected by those decisions. These facts bring the State squarely within the language of the regulation which grants it standing to appeal.

The determinative issue involved in these appeals concerns the propriety of rejecting the State selection applications while approving the Native allotment applications without first affording the State notice of the conflicts, that BLM would approve the conflicting applications and reject the State's applications, and without affording the State the opportunity to contest the conflicting applications.

[2] ALSC argues that the State has no standing to challenge the allotment applications because lands occupied by Natives do not fall within the ambit of the provision of the Alaska Statehood Act allowing the State to select "public lands of the United States which are vacant, unappropriated and unreserved." A difficulty with this argument is that it is based upon a factual premise which the State is challenging, namely, the occupancy of the Natives under the Allotment Act. The State's position is that if the use and occupancy of the individual Natives are not sufficient to warrant allowance of their allotment applications and the land is otherwise available, it is subject to their selection applications. Implicit in its contentions are issues concerning the type, extent, and adequacy of the Natives' use and occupany.

A case cited to support ALSC's contentions concerning the effect of Native occupancy is *State of Alaska* v. *Udall*, 420 F. 2d 938, 940 (9th Cir. 1969), wherein the court refused to rule as a matter of law "that under no circumstances could Indian trapping, hunting and camping * * * constitute a condition which would deprive the selected lands of the status of being 'vacant, unappropriated, and unreserved.'" There a Native village intervened as a party defendant in a suit by the State against the Secretary of the Interior. The Natives asserted that the village had possessory rights to lands sought by the State under selection applications. The Natives' alleged rights were based on present and aboriginal use and occupancy. The court held there were genuine issues of material fact requiring a trial. It refused to rule as a matter of law then on the aboriginal claims asserted by Natives and their affect upon the State. It specifically noted that pending legislation might resolve the question.

Thereafter, the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1601 (1976), was passed by Congress to resolve the Native aboriginal claims asserted for much of the area of the State of Alaska. Dis-

cussions of the circumstances, statutes, cases, and other matters leading to the passage of ANCSA are in recent court decisions concerning the effect of the Act. *See, e.g., Cape Fox Corp.* v. *United States*, 456 F. Supp. 784 (D. Alaska 1978); *United States* v. *Atlantic Richfield Co.*, 435 F. Supp. 1009 (D. Alaska 1977); *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D.D.C. 1973). From the rulings in the afore-cited cases, it appears that any Native claims based solely upon aboriginal occupancy can no longer serve as a bar to State selections, although State selections may ultimately be barred to specific lands granted to Native corporations or villages by provisions of ANCSA. Passage of ANCSA and these cases interpreting it have now superseded *State of Alaska* v. *Udall*, *supra*, and the implication raised there that aboriginal Native claims might bar State selections.

[3] The issue ALSC has raised concerning conflicts with Native village selections under ANCSA does not bar the State's standing here. Although under ANCSA final approval of village selections would require rejection of conflicting State selections, as the State has pointed out, the villages here have selected more acreage than allowed to them under ANCSA. Therefore, until there has been a final determination of the areas granted to the villages, the State retains its interest in the land by its selection application and the possibility that its interest may ultimately be defeated does not take away its present interest and standing. Any doubt about the State's standing to challenge Native claims conflicting with its selection rights has been resolved by the United States Court of Appeals for the District of Columbia Circuit in *Koniag, Inc.* v. *Andrus*, 580 F. 2d 601 (D.C. Cir. 1978), *cert. denied*, 99 S. Ct. 733 (1979). In *Koniag* the State had not yet filed selection applications for land claimed by the villages. However, the mere possibility that it might later seek to select such land was held to be sufficient to confer standing on the State to challenge the eligibility of Native Alaskan villages under ANCSA pursuant to regulations of this Department applicable to the Alaska Native Claims Appeals Board. The State's position is stronger here than in *Koniag* as it has filed selection applications for the lands in conflict. It was noted in *Koniag* at 613–614 that there are conceptual differences between judicial and administrative standing; thus, a party might not have standing to obtain judicial review but could have administrative standing. The court then stated:

> The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law

of judicial standing into the administrative process.

Id. To determine administrative standing, the court suggested that the language of the statutes and the agency regulations should be the starting point. Where the language is general, such as speaking of persons "aggrieved," "affected," or having an "interest," there may be need for a functional approach to determine the issue. After analyzing court authorities, the court, at 616, concludes:

> These authorities suggest a functional analysis composed of the following factors:
>
> (1) The nature of the interest asserted by the potential participant.
>
> (2) The relevance of this interest to the goals and purposes of the agency.
>
> (3) The qualifications of the potential participant to represent this interest.
>
> (4) Whether other persons could be expected to represent adequately this interest.
>
> (5) Whether special considerations indicate that an award of standing would not be in the public interest.
>
> Such a standard would have to be flexible, of course, and the appropriate variables might well vary from one context to another.[13] The important point is that administrative standing should be tailored to the functions of the agency, not to arcane doctrine from another area of the law.

[13] One important distinction might be between a would-be participant seeking to institute a new administrative hearing or appeal, and one merely seeking to intervene in an on-going proceeding. An award of standing in the former circumstances is clearly more burdensome than in the latter. *See* 3 K. Davis, Administrative Law Treatise 241 (1958). Since intervention generally has no effect on what decisions are reached, or when they are rendered, it might be appropriate in considering requests for intervention merely to focus on (1) whether the potential intervenor represents a point of view that would assist in illuminating the issues; (2) whether he is qualified to represent this point of view; (3) whether other parties to the proceeding could be expected to represent this perspective; and (4) whether there are special considerations that indicate intervention would not be in the public interest.

The court then applied this "functional" standard and found that the State was properly held to have standing to appeal the Native village eligibility determinations. We have previously ruled that the State had standing to appeal because it had an application which was rejected, and, thus, was adversely affected by the decision. The State's selection applications also give it an interest in the land sufficient to meet the requirements of the private contest regulation, 43 CFR 4.450–1, which provides in part:

> Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations herein.

Where the State desires to present evidence concerning the sufficiency of a Native's use and occupancy, this would be information outside the records of BLM. Under the functional approach, this would be helpful to the agency. We rec-

ognize the special obligation and interest of the Secretary of the Interior with regard to Indians and Natives in Alaska; however, he also has a statutory duty to assure that there has been compliance with the public land laws, including the Alaska Native Allotment Act and the Alaska Statehood Act, before land is conveyed pursuant to such laws. As a mere stakeholder here, this Department must be concerned with fairness to all parties. Therefore, we cannot accept the argument by ALSC that because of Interior's special duty to Natives, the State should not be allowed to challenge the Native allotments. We must conclude that under the standard enunciated in *Koniag* the State has standing here, and also under the contest regulation quoted above. We have specifically held that the State has standing to bring a private contest against Native allotment applications conflicting with a State airport where the State had a selection application and an airport lease application and contended that the airport extension was needed for local community and public interest needs. *State of Alaska*, 40 IBLA 79 (1979). *See also*, *State of Alaska*, 40 IBLA 118 (1979).

[4] In *State of Alaska*, 40 IBLA 79 (1979), and many other cases, the Department has consistently recognized that states are included within the term "person" in the contest regulation. *See e.g.*, *Navajo Tribe of Indians* v. *State of Utah*, 12 IBLA 1, 80 I.D. 441, 501 (1973); *State of California* v. *Doria Mining and Engineering Corp.*, 17 IBLA 380 (1974), *aff'd*, *Doria Mining and Engineering Corp.* v. *Morton*, 420 F. Supp. 837 (C.D. Cal. 1976); *State of California* v. *Rodeffer*, 75 I.D. 176 (1968); *State of Louisiana* v. *State Exploration Co.*, 73 I.D. 148 (1966).

In a private contest, as well as a Governmental contest, the Native must be given adequate notice and an opportunity for an oral hearing. In *Donald Peters*, 26 IBLA 235, 83 I.D. 308 (1976), *reaffirmed*, 28 IBLA 153, 83 I.D. 564 (1976), we held that the Departmental contest procedures would be applied when there is an issue of fact to be resolved in adjudicating Native allotment applications. In *Pence* v. *Andrus*, 586 F. 2d 733 (9th Cir. 1978), the Court of Appeals held that these procedures comply, at least facially, with the due process requirements set out in *Pence* v. *Kleppe*, 529 F. 2d 135 (9th Cir. 1976). That case ruled that Native allotment applicants had a sufficient property interest in their allotment applications so as to be entitled under due process to adequate notice and an opportunity for an oral hearing before their applications can be rejected because of insufficient use and occupancy.

Under the Alaska Native Allotment Act there must be "substantial use and occupancy" by a Native. As mentioned before, *State of Alaska* v. *Udall*, *supra*, left to a fact-finding trial a determination whether Native aboriginal claims

based on trapping, hunting, and camping could bar a State selection. However, aboriginal claims have now been abolished and that case has, in effect, been superseded by cases decided since ANCSA. We need not decide, in the present posture of this case, issues pertaining to the type of use and occupancy by a Native in his/her individual capacity seeking title under the Alaska Native Allotment Act which would be sufficient to bar the State, except to say that, at a very minimum, the use and occupancy would have to be sufficient to meet the statutory and regulatory requirements for allowance of an allotment if there were no conflicting claim.[4] We shall await future action and briefing by the parties before deciding whether there may be a more strict standard of use and occupancy, or at least, a more strict burden of proof necessary where there are third-party claims conflicting with an allotment application than where only the United States is involved and the Secretary is exercising his discretionary authority in making an allotment.

From the above, it is clear that the State has standing to contest a Native allotment application conflicting with its selection application regardless of whether the land is also within a Native village selection area. It also has standing to appeal an adverse decision affecting its selection application because of a conflict.

[5] Here, however, the State was not afforded an opportunity to contest the claims before its application was rejected. The action by BLM, therefore, afforded the State no choice but to appeal from the adverse decisions. This was not proper procedure in these circumstances. For this reason, we shall set aside the decisions to afford the State its opportunity to contest the conflicting claims if it desires.

The State's argument that the United States must contest all Native allotment claims where there is a conflicting State selection cannot be accepted. Only if BLM, or this Board on review, determines that there is a question as to a Native's compliance with the Act so as to warrant the initiation of a Government contest or a need for a hearing on facts prior to an exercise of discretion need such action be taken. Because the issues raised in these appeals primarily concern the procedural rights of the State, we are not ruling on merits of the Native allotment applications. When these case records are returned to BLM, it shall give notice of their return to the State and afford it time within which to bring private contest proceedings against the Natives' conflicting claims. If the State fails to do so within the time required, BLM may then reject the State selection applications. The State may then appeal to this Board for a review of the case on its merits pursuant to subpart 43 CFR 4.400. This review, however, will be limited to deciding

[4] For examples of Indian or Native occupancy and third party claims, compare *Cramer* v. *United States*, 261 U.S. 219 (1923), with *Herbert H. Hilscher*, 67 I.D. 410 (1960). *Also see Navajo Tribe of Indians* v. *State of Utah, supra.*

whether the application was properly rejected because the Native allotment application is properly allowed, or whether there is doubt as to the adequacy of the allotment application so as to warrant a contest by the United States. *See State of Alaska*, 41 IBLA 309 (1979).

Notice of future proceedings should be given to the Native villages and any other conflicting parties.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are set aside and the cases remanded for further proceedings consistent with this opinion.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

APPENDIX A

IBLA No.	*Native Allotment No. and Name*		*Conflicting State Selection No.*
*76-639	Mary K. Zimin	AA-6157	A-053268
76-640	Marsha Thorson	AA-7208	A-054308
76-641	Nicoli Tungiung	AA-7785	A-054358
			A-054590
76-687	Wassillie Ilutsik	AA-7292	A-054310
			A-054373
76-689	Bernice Brown	AA-7324	A-052985
76-690	Rose Wheeler	AA-067589	A-058734
76-691	Natalie Odegaard	AA-067640	A-053268
*76-692	Phyllis Westcoast	AA-7307	A-054332
76-715	Erma Lawrence	AA-6553	AA-208
76-716	John Estabrook	AA-6973	AA-4805
76-777	Vera Tschaepl	AA-6614	A-050580

* The State has withdrawn its appeals in part as to parcels within the Native village compulsory core townships.

JAMES MOORE

1 IBSMA 216

Decided *July 20, 1979*

Appeal by the Office of Surface Mining Reclamation and Enforcement (OSM) from a Jan. 16, 1979, decision of Administrative Law Judge David Torbett vacating a notice of violation and two orders of cessation issued by OSM under the authority of sec. 521 of the Surface Mining Control and Reclamation Act of 1977.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

In a case on appeal, the Board bases its deliberations on the record before it.

2. Surface Mining Control and Reclamation Act of 1977: Initial Regula-

tory Program: Performance Requirements: Applicability

The extraction of coal as an incidental part of privately financed construction is not an activity excluded, as such, from coverage by the performance requirements of the initial regulatory program.

3. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally

Where the applicant for review bases his defense upon the assertion that the amount of coal removed or to be removed is less than that provided by law to constitute surface coal mining, he must prove such an assertion.

APPEARANCES: John Philip Williams, Esq., Office of the Field Solicitor (Knoxville), Michael J. Kurman, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor, Office of the Solicitor, for the Office of Surface Mining Reclamation and Enforcement, and Warren N. Scoville, Esq., Lewis and Scoville, London, Kentucky, for James Moore.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

Factual and Procedural Background

On July 12, 1978, representatives of the Office of Surface Mining Reclamation and Enforcement (OSM) issued to James Moore (Moore) an order of cessation, for mining without a state permit, under the Surface Mining Control and Reclamation Act of 1977 (Act),[1] as well as a notice of violation alleging four separate violations of the Act. On July 20, 1978, Moore applied for review of these enforcement actions. The inspectors returned to the site on July 26, 1978, for the purpose of attending a minesite review hearing requested by Moore. At that time, based on their observations of remedial work done by Moore in the interim, the inspectors terminated the notice for two of the alleged violations but issued a cessation order for the other two because Moore had failed to abate those violations.

At the hearing on Moore's application for review, held on Sept. 21, 1978, it became clear that Moore did not and would not otherwise contest the procedural and substantive validity of the issuance of the notices and orders if it could be legally concluded that Moore and his operation were covered by the Act. Moore contended that, since the major purpose of his operation was the building of a racetrack to which the extraction of coal was incidental, he was not surface mining and therefore was not subject to the Act. Thus, the Administrative Law Judge (ALJ) conducted the hearing solely on the issue of the Act's applicability and not on the substantive validity of the alleged violations. Throughout the hearing and in its post-hearing brief, OSM contended principally that Moore and his operation are subject to the

[1] 30 U.S.C.A. §§ 1201–1328 (West Supp. 1979); P.L. 95–87, 91 Stat. 445 (1977).

Act because Moore had conducted "surface coal mining operations" as that term is defined in the Act and because Moore had extracted more than 250 tons of coal per year for commercial use.

On Jan. 16, 1979, the ALJ issued a decision in which he concluded that Moore was not subject to the Act. The basis for that conclusion was his determination that Moore was neither an operator nor a permittee for purposes of the Act. Concentrating almost exclusively on the former description, the ALJ held that OSM failed to prove that Moore removed or intended to remove from his property more than 250 tons of coal in a year and that, therefore, OSM had failed to prove that Moore was an operator.

OSM appealed the ALJ's decision on Feb. 16, 1979, and filed a detailed and lengthy brief on Mar. 19, 1979. After requesting and receiving an extension of time for the filing of a brief, Moore filed with the Board, on Apr. 30, 1979, a copy of the decision of the ALJ along with a copy of a Memorandum of Law that had also been previously filed with the ALJ.

On Apr. 24, 1979, the Board had issued its decision in *Dennis R. Patrick*, 1 IBSMA 158, 86 I.D. 266 (1979), in which the Board dealt with issues similar to the issues in this case. The parties requested and were granted leave to submit additional briefs addressed to the implications of *Patrick*. OSM chose to do so.

Discussion

[1, 2] In *Patrick*, the Board held that the initial Federal regulatory program is not applicable to a surface coal mining operation which is located on state land and which is not subject to state regulation within the scope of any of the initial performance standards. On the basis of the record presented to the Board in *Patrick*, it determined that Patrick's privately funded construction project was located on land within the jurisdiction of the Commonwealth of Kentucky, but that his project was not subject to regulation by the Commonwealth within the scope of any of the initial Federal performance standards. Were the record in this case the same, as to Kentucky law governing coal extraction incidental to a privately funded construction project, the Board would be governed by *Patrick* and hold accordingly. On the basis of the record before it in this appeal, however, the Board must conclude that under Kentucky law, just as under the Federal interim regulations, privately funded construction projects are not, as such, excluded from coverage of the performance requirements pertinent to surface coal mining operations.[2] It follows

[2] A regulation of the Kentucky Department for Natural Resources and Environmental Protection, cited by Moore in his hearing memorandum and by OSM in its answer to the Application for Review (although in its supplemental brief to this Board OSM states that Kentucky has not promulgated any pertinent regulations), provides that the requirements of Kentucky's strip mining statute, KRS Chapter 350, shall not apply to the

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that the letter of Sept. 21, 1978, whereby Moore was informed by the Division of Permits (Kentucky Department for Natural Resources and Environmental Protection) that a state mining permit would not be required for his construction project, does not insulate Moore from regulation by OSM because that letter may not be viewed as an expression of the state authority's lack of power to regulate Moore's operation under existing Kentucky law.[3]

The ALJ held that Moore was not subject to the requirements of the interim regulations because he was not an "operator." [4] Under the interim regulations, however, persons are generally subjected to the law because they are "permittees." As we held in *Delight Coal Corp.*, 1 IBSMA 186, 86 I.D. 321 (1979), a permittee, during the interim regulatory period, is one who conducts surface coal mining operations that are regulated by a state under state law whether or not he has applied for or been issued a formal certificate to that effect.[5] To be subject to regulation under Kentucky law, Moore must be, *inter alia*, an "operator" as that term is used in *state* law. Under Kentucky law, an "operator" is defined as one "who removes or intends to remove more than two hundred fifty (250) tons

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"extraction of coal as an incidental part of highway or other construction financed by federal, state or local government." 405 KAR 1:020E § 1(2) (May 3, 1978). This provision does not exclude from the coverage of Kentucky's coal mining regulations privately financed construction such as that conducted by Moore. The "policy" statement to the contrary (Policy Memorandum 78–0004 of the Secretary of Kentucky's Department for Natural Resources and Environmental Protection, Aug. 28, 1978), which was given considerable weight in *Patrick*, must be ignored in view of this regulatory provision and the mandate of 405 KAR 1:020E § 2 (May 3, 1978) that the regulations of 405 KAR Chapter 1 are "to be construed as compatible with federal regulations adopted pursuant to Public Law 95–87, the 'Surface Mining Control and Reclamation Act of 1977'."

The Federal counterpart of 405 KAR 1:020E § 1(2) is 30 CFR 700.11(c), which implements 30 U.S.C.A. § 1278(3) (West Supp. 1979). Although the language of 30 CFR 700.11(c) is not discussed in the Preamble to the interim regulations, the legislative history of 30 U.S.C.A. § 1278(3) makes clear that only publicly financed construction projects are exempt from the coverage of the Federal surface coal mining performance standards. *See* H.R. Rep. No. 95–493, 95th Cong., 1st Sess. 112 (1977).

[3] That a state does not *in fact* regulate a particular surface coal mining operation (as defined by Federal law) does not prevent OSM from doing so under the authority of the interim regulations. During the initial regulatory program, the critical determinant of OSM's jurisdiction over a surface coal mining operation conducted on state land is whether the operation is *subject* to state regulation within the scope of any of the initial Federal performance standards.

[4] In the Federal interim regulations, an "operator" is defined as one "engaged in coal mining who removes or intends to remove more than 250 tons of coal from the earth by mining within 12 consecutive calendar months in any one location." 30 CFR 700.5. The term "operator," though, is only sparingly utilized in the regulations after it is defined. For example, it is part of the title in 30 CFR 710.12 ("Special exemption for small operators."), and it appears later in 30 CFR 723.12(d)(3), concerning assessment procedures for civil penalties ("In calculating points to be assigned for negligence, the actions of all persons working on the mine site shall be attributed to the permittee or operator.").

[5] There is no minimum tonnage requirement in the interim regulations insofar as the definition of a "permittee" is concerned. 30 CFR 700.5.

of coal within twelve (12) successive calendar months * * *." KRS 350.010(6); 405 KAR 1:010E § 1 (34).[6] If Moore did not remove or intend to remove more than 250 tons of coal in a 12-month period, then, under Kentucky law, he would not be subject to State regulation within the scope of the initial Federal performance standards and, thus, not subject to OSM's jurisdiction.

The ALJ seems to have determined that OSM failed to carry its burden in establishing a removal of or intent to remove more than 250 tons of coal by Moore. If the burden were on OSM so to demonstrate, there is adequate support in the record for the ALJ to have found the way he did. Although OSM offered testimony to the effect that many times 250 tons of coal were saved, the ALJ was rightly entitled to reject that testimony and some of the inferences on which it was based and to confine himself to the 100–120 tons of stockpiled coal that was conceded by Moore. This conclusion, however, is warranted only if the burden were in fact on OSM to establish the removal. The Board does not believe it was.[7]

[3] When OSM issued its notice of violation, it, in effect, charged Moore with being a permittee who had violated certain provisions of the interim regulations. Charging that someone is a permittee, in Kentucky, includes an allegation that the person has removed or intends to remove over 250 tons of coal in a 12-month period. If undisputed, this allegation is deemed admitted. If it is disputed, though, it is up to the alleged permittee to establish that he did not remove or intend to remove the requisite amount of coal.[8] To hold otherwise would make the efficient administration of the Act more difficult. The permittee is the one with ready access to the records to show how many tons were removed or sold within any period. In this case, Moore testified he kept

[6] Unlike the Federal law, the term "permittee" does not appear in the Kentucky strip mining statute. Instead, the critical status appears to be that of "operator," because all of the mandates of the Kentucky statute are directed to operators. *See* KRS Chap. 350 (May 3, 1978); *see especially* KRS 350.028(3) and KRS 350.060. In this regard we note, also, that the Kentucky Department of Natural Resources and Environmental Protection has adopted, in essence, the definition of "operator" as an applicability provision in the regulations issued to implement KRS Chap. 350. 405 KAR 1:020E § 1(3).

[7] The procedural regulations provide that in proceedings to review notices of violation and orders of cessation OSM has the burden of establishing a prima facie case but that the ultimate burden of persuasion rests with the applicant for review. 43 CFR 4.1171. A prima facie case is made where sufficient evidence is presented to establish the essential facts and which evidence will remain sufficient if not contradicted. It is evidence that will justify but not compel a finding in favor of the one presenting it. OSM made such a presentation.

[8] In his Statement of Facts and Memorandum of Law, which constituted his Application for Review, Moore nowhere indicated that he intended to raise, much less rely on, the fact that he had removed or intended to remove less than 250 tons of coal in a 12-month period. Instead, he based his defense on the immunity of private construction projects to the interim regulations. The Board has, based upon the record in this case, rejected that defense.

no records (Tr. 107). He also stated he did not know exactly how much coal he had sold (Tr. 110, 111). There was testimony that 1,800 tons to 2,600 tons could have been removed (Tr. 38, 85). As to intention, Moore testified that he intended to sell more coal as it was removed (Tr. 117). None of the testimony, provided it is the duty of the permittee/operator to show such, could justify a conclusion that 250 tons or less of coal had been removed or were intended to be removed during a period of operation not exceeding 12 consecutive months. And, as in an affirmative defense, the one making the defense must establish it by pleading as well as proving it. It may be that failure to plead can be waived. Proof, though, absent a concession by the other party, is essential.

In view of the foregoing, we find that Moore failed to carry his burden as to the amount of coal removed or intended to be removed.[9] The judgment of the ALJ is therefore reversed.

MELVIN J. MIRKIN,
Administrative Judge.

WILL A. IRWIN,
Chief Administrative Judge.

IRALINE G. BARNES,
Administrative Judge.

[9] *See* fn. 7, *supra*, discussing the burdens of proof set forth in 43 CFR 4.1171.

JUNE OIL AND GAS, INC.
COOK OIL AND GAS, INC.

41 IBLA 394

Decided *July 24, 1979*

Appeal from a decision of the Colorado State Office, Bureau of Land Management, rejecting appellants' simultaneous oil and gas lease offers, C–26939 and C–27026.

Affirmed.

1. Oil and Gas Leases: Applications: Drawings—Oil and Gas Leases: Applications: Filing

Where offers for the same parcel of land are filed by two corporations in a simultaneous oil and gas lease drawing, and where the directors of the first corporation having authority to file offers and execute leases are directors of the second with the same authority and the surrounding circumstances suggest that the corporations are interrelated, the drawing is inherently unfair and the offers are properly rejected as a prohibited multiple filing. Collusion or intent to deceive the Department need not be shown.

APPEARANCES: Philip G. Dufford, Esq., Welborn, Dufford, Cook and Brown, Denver, Colorado, for both appellants; Lyle K. Rising, Esq., Office of the Denver Regional Solicitor, Department of the Interior, for the Government.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

INTERIOR BOARD OF LAND APPEALS

In June and July 1978, June Oil and Gas, Inc., and Cook Oil and Gas, Inc., submitted offers for the simultaneous oil and gas lease drawings held by the Colorado State Office, Bureau of Land Management (BLM). Specifically, both corporations submitted drawing entry cards for parcel No. CO–337 in the June drawing and for parcel No. CO–361 in the July drawing. June Oil and Gas, Inc., received first priority on parcel No. CO–337 and second priority on parcel No. CO–361. Cook Oil and Gas, Inc., received no priority on parcel No. CO–337 as its card was not drawn, but received first priority on parcel No. CO–361. After review of the qualifications file for each corporation, BLM concluded that the corporations were interrelated and thus had gained a greater probability of successfully obtaining a lease or an interest in a lease in the drawing when both submitted offers on the same parcels. Therefore BLM rejected the priority offers stating that a multiple filing in violation of 43 CFR 3112.5–2 had occurred and citing in support of the decision, *Schermerhorn Oil Corp.*, 72 I.D. 486 (1965). Both corporations have appealed that decision and the cases were consolidated for review.

The relevant portion of 43 CFR 3112.5–2 states:

> When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawing by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3110.1–6(b), all offers filed by either party will be rejected.

Review of the corporate qualifications files maintained by the Colorado State Office for each corporation indicates that June Cook owns 100 percent of June Oil and Gas, Inc., and is chairman of the board of directors. Michael C. B. Cook owns 100 percent of Cook Oil and Gas, Inc., and is also chairman of the board of that corporation. At the time that the lease offers which are the subject of this appeal were made, the officers of each corporation were as follows:

	June Oil and Gas, Inc.	*Cook Oil and Gas, Inc.*
President/Director	Michael C. B. Cook	June Cook
Secretary/Treasurer/Director	Adrianna van der Stok	Adrianna van der Stok
Vice President for Land Administration	Madeline A. Meyer	Kati P. Ward

All of these directors, including the chairmen of the boards, and officers were authorized to sign on behalf of their corporations with respect to oil and gas leasing matters.

The Articles of Incorporation for each company state identical purposes,[1] list the same incorporators, and designate initial registered offices with the same address. In fact, the Articles of Incorporation for each are identical except for the names of the initial directors and registered agent of each. The Articles of Incorporation were executed on the same day and filed with the State of Colorado on the same day. The two corporations continue to have the same address and, as noted in appellants' statement of reasons and brief, share business facilities and personnel for purposes of convenience.

Appellants argue that *Schermerhorn Oil Corp.*, *supra*, is "irrelevant to the case at issue" because neither of the two corporations own stock in the other as did Schermerhorn and thus no unfair advantage was gained by both corporations having filed. In addition, appellants assert that a multiple filing does not occur when the cards are filled out by the same person if they were signed by different persons. Appellants further claim that the sharing of common facilities for business purposes does not constitute a multiple filing unless some agreement exists that the participants will mutually benefit from each other's offer.[2]

We would agree with appellants' argument that *Schermerhorn Oil Corp.*, *supra*, is distinguishable, though only in part, because the two corporations are independently owned. However, we do not agree that the *Schermerhorn* decision is irrelevant to the cases at issue. In that case, one corporation, Schermerhorn, held a 29 percent stock interest in a second, Kenwood. The Deputy Solicitor ruled that when both corporations filed a lease offer for the same parcel of land, Schermerhorn had 1¼ chances of success because of its ownership of Kenwood stock. Thus the drawing in which they participated was inherently unfair whether or not there had been collusion or intent to de-

[1] The third provision of both Articles of Incorporation reads in relevant part:

"(a) Purpose. The nature, object and purposes of the business to be transacted shall be as follows:

"(i) To acquire and obtain interests in oil and gas leases.

"(ii) To develop oil and gas leases.

"(iii) To acquire and engage in other businesses. To acquire (for cash or in exchange for its assets or securities or otherwise) operate, dispose of and otherwise deal and engage in any lawful business or activity for which corporations may be organized under the laws of Colorado."

[2] Appellants cite *D. E. Pack*, 30 IBLA 166, 84 I.D. 192 (1977), as support for this proposition. However, *Pack* does not involve the sharing of common facilities for business purposes but rather the use of a filing service by an oil and gas lease applicant. The Board held that where an applicant files a lease offer through a leasing service under an arrangement where the applicant uses the leasing service's address and avails himself of other services, but no enforcement agreement is entered into which would require the applicant, if successful, to transfer any interest in the lease to the leasing service, then the service is not a party in interest.

ceive the Department and the Schermerhorn lease offer was properly rejected. Appellants correctly argue that this is not the situation we have before us now.

However, in *Schermerhorn Oil Corp.*, *supra*, rejection of the Kenwood offer was upheld as well because of the additional finding that all of the officers of Schermerhorn with authority to execute offers and leases were also officers of Kenwood with the same authority. Similar circumstances are present in the cases now at issue. Here June Cook, the sole stockholder and chairman of the board of June Oil and Gas, Inc., is a director and officer of Cook Oil and Gas, Inc. Similarly, Michael C. B. Cook, the sole stockholder and chairman of the board of Cook Oil and Gas, Inc., is a director and officer of June Oil and Gas, Inc. In addition, the two corporations have a common secretary-treasurer/director. The sole office held by different persons for each corporation is that of Vice President for Land Administration. As previously noted, all directors and officers of each corporation may execute oil and gas offers and leases on behalf of their corporations. Consequently, as in *Schermerhorn Oil Corp.*, *supra*, director/officers common to both corporations may file lease offers for the same land on behalf of both corporations.

The directors of a corporation are its governing body. They generally exercise all powers vested in the corporation and are responsible for the management of ordinary corporate affairs as well as the management, control, and use of corporate property. 19 C.J.S. *Corporations* § 742 (1940). In *Panra Corp.*, 27 IBLA 220 (1976), the Board quoted the following statement concerning the duties of corporate directors and officers from *Alvest, Inc.* v. *Superior Oil Corp.*, 398 P. 2d 213 (Alaska 1965):

> A corporate officer or director stands in a fiduciary relationship to his corporation. Out of this relationship arises the duty of reasonably protecting the interests of the corporation. It is inconsistent with and a breach of such duty for an officer or director to take advantage of a business opportunity for his own personal profit when, applying ethical standards of what is fair and equitable in a particular situation, the opportunity should belong to the corporation. Where a business opportunity is one in which the corporation has a legitimate interest, the officer or director may not take the opportunity for himself. If he does, he will hold all resulting benefit and profit in his fiduciary capacity for the use and benefit of the corporation. [Citations omitted.]

398 P. 2d at 215. The Board has previously held that when a director or officer of a corporation individually files a lease offer for the same land as the corporation itself files, a prohibited multiple filing occurs because the individual filing constitutes the taking of a corporate business opportunity for personal profit.

Such action is a breach of the director's or officer's fiduciary duty to the corporation and thus the profit accruing to that individual must be held for the corporation's benefit. As a result, the corporation will have had two chances to obtain the oil and gas lease. *William R. Boehm* 36 IBLA 346 (1978); *William R. Boehm*, 34 IBLA 216 (1978); *Graybill Terminals Co.*, 33 IBLA 243 (1978); *Panra Corp., supra. See McKay* v. *Wahlenmaier*, 226 F. 2d 35, 44–46 (D.C. Cir. 1955). We find this principle also applicable to the present cases as it defines the relationship between June Oil and Gas, Inc., and Cook Oil and Gas, Inc., and identifies the problem which occurs when both file lease offers. In most instances, directors with fiduciary obligations to two competing corporations cannot reasonably protect and promote identical interests in a single business opportunity for the two corporations at the same time. When a business opportunity, such as filing for an oil and gas lease, arises which is equally appropriate for either corporation, the directors cannot take the opportunity for one of the corporations without breaching their duty to the other unless the corporations are in fact not competing and the action is beneficial to both regardless in whose name the action is taken. Therefore, in most instances, if directors decide to file offers on behalf of both corporations, they also will breach their fiduciary duty to each because the second filing lessens the chance of success of the first offeror as between two competing offerors. Such dual filings could only be justified if they were beneficial to both corporations; that is, if they increased each corporation's chance at successfully obtaining an interest in the sought-after lease.[3]

The drawing entry cards at issue in these cases were signed on behalf of each corporation by the one officer who is neither a director nor common to both corporations.[4] We hold that this fact does not change the result in this instance given the

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[3] The seventh provision of the Articles of Incorporation of each corporation appears to broadly relieve the corporations of the effect of interested or of common directors or officers in any corporate transaction. It reads in part:

"SEVENTH: The following provisions are inserted for the management of the business and for the conduct of the affairs of the corporation, and the same are in furtherance of and not in limitation or exclusion of the powers conferred by law.

"No contract or other transaction of the corporation with any other persons, firms or corporation, or in which this corporation is interested, shall be affected or invalidated by (a) the fact that any one or more of the directors or officers of this corporation is interested in or is a director or officer of such other firm or corporation; * * *."

The Board submits that closely-held corporations cannot unilaterally act to relieve themselves of obligations under Federal oil and gas leasing laws. In this instance, it would be particularly self-serving, given the other common characteristics, for the corporations to attempt to claim on the basis of such a provision that the director's interests cannot be considered with respect to the multiple filings issue.

[4] The fact that the cards were apparently filled out by the same person is significant as evidence of joint operations and awareness of the two corporations that both were filing on the same parcels of land.

interlocking management responsibilities of the directors and the other common characteristics outlined at the beginning of this opinion. June Oil and Gas, Inc., and Cook Oil and Gas, Inc., are so interrelated by virtue of their common director/officers and these other factors that it is difficult to define where the interests of each of the corporations begin and where they end. We would note further that appellants also apparently view themselves as having the same interests since they are represented by the same counsel in this case and one brief was submitted on behalf of both corporations. Where all of the circumstances so strongly suggest such common interests as to have made the drawing inherently unfair, collusion or intent to deceive the Department need not be shown. BLM has properly rejected their offers as a prohibited multiple filing.

Appellants suggest that it would be a rule without a purpose to prohibit the conduct of two corporations where the sole owners of each of the corporations could have filed on exactly the same parcels in the same manner in their individual capacities as husband and wife.

Appellants are correct in their contention that a husband and wife may individually file for the same parcel of land in a simultaneous drawing without running afoul of either the sole party in interest requirement or the multiple filing prohibition. *See generally*, *Solicitor's Opinion*, M–36416 (Feb. 27, 1957); *Solicitor's Opinion*, M–36418, 64 I.D. 51 (1957). This argument, however, is not apropos to appellants' situation.

June and Michael Cook, each the sole owner of one of the corporations, are not citizens of the United States, but of the Netherlands (June) and Great Britain (Michael). Under the statute and regulations, aliens may not acquire or hold any direct or indirect interest in leases, except through ownership or control of stock in corporations holding oil and gas leases, provided that the laws of the alien's country do not deny similar privileges to citizens of the United States. *See* 30 U.S.C. § 181 (1976); 43 CFR 3102.2–1(a). Thus, in actual fact, neither June Cook nor Michael Cook could have filed for an oil and gas lease in their own name. It is only through the ownership of stock in a corporation that either can hold any interest in an oil and gas lease.

Moreover, the rule prohibiting multiple filings would be without substantial efficacy if two corporations as closely identified as June Oil and Gas, Inc., and Cook Oil and Gas, Inc., were allowed to file mutually beneficial lease offers simply because they were controlled by husband and wife. The issue in this case is not the marriage relation-

ship of the controlling shareholders; rather, it is the nature of the two corporations themselves. Having availed themselves of the benefits attendant to the corporate structure, the owners cannot simultaneously request that their actions be treated as if no corporation actually existed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JAMES L. BURSKI,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

DOCUMENTS

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